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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-393

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DONALD N. PACHECO
PACHECO, AUER & MANZANARES, P.C.
Suite 1040, Capitol Life Center
Denver, Colorado 80203
Telephone: (303) 892-5700

THOMAS W. TIERNEY
2700 Commerce Tower
Kansas City, Missouri
Telephone: (816) 474-9767
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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SUPPLEMENTAL STATEMENT

Pursuant to Rule 58(2) of the Rules of the Supreme Court, Petitioner respectfully submits the within Petition for Rehearing of the Court's Order denying certiorari in these proceedings entered January 21, 1974, calling the Court's attention to substantial grounds available to Petitioner not previously presented.

ADDITIONAL QUESTIONS PRESENTED BY INTERVENING MATTER

1. Where petitioner's proven participation in alleged overt acts in furtherance of a conspiracy amounted to nothing more than acts of silence and failure to disclose information which would otherwise constitute valid exercises by him of his Fifth Amendment rights against self-incrimination, can such acts be relied upon to supply validity to an otherwise defective indictment and permit prosecution under a charge which would otherwise be barred by limitations. As a subsidiary question fairly comprised therein, does any claimed waiver of such Fifth Amendment rights supported only by notice of an investigation of substantive charges, and without notice of any conspiracy investigation, violate the principles enunciated by this Court in *Miranda* and others.

2. Whether the reliance by the Government upon overt acts (i) and (j) as referred to in the indictment to extend the Statute of Limitations as to Count III was constitutionally impermissible and violative of petitioner's right to due process of law as guaranteed.

3. Whether, in view of divergent application by the various Circuits, clarification is needed by the Court regarding the test for admissibility of evidence under the federal shop-book rule, 28 U.S.C. § 1732 (a), and whether the absence of inherent trustworthiness of records as an essential element of such admissibility has resulted in a denial of due process to this petitioner.

4. Whether the joinder of an entirely separate conspiracy charge (Trial Count III), arising out of a wholly separate series of acts, transactions, scheme, plan or design, with two distinct substantive charges (Trial Counts I and II) is constitutionally impermissible where such joinder

results in extreme prejudice to the defendant in the eyes of the jury, confounds his defense and permits the accumulation of unrelated evidence to be weighed against him; whether the present petitioner was denied a fair and impartial trial on the substantive charges against him because such impermissible joinder promoted a finding of substantive guilt solely by inference from massive and cumulative conspiracy evidence; and whether the joinder permitted herein is in direct conflict with the decision of this Court in *McElroy* v. *United States*, 164 U.S. 76, 17 S. Ct. 31 (1896).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ Rule 8(a). *Joinder of offenses and of defendants*

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

United States Code, Title 18:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

United States Code, Title 18:

§ 3282. *Offenses not capital*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

United States Code, Title 26:

§ 7206(1). *Any person who—*

(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

United States Code, Title 28:

§ 1732. *Record made in regular course of business; photographic copies*

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or

record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the orginal is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

ADDITIONAL REASONS FOR GRANTING THE WRIT PRESENTED BY INTERVENING MATTER

1. Where the petitioner's proven participation in alleged overt acts in furtherance of a conspiracy amounted to nothing more than acts of silence and failure to disclose information which would otherwise constitute valid exercises by him of his Fifth Amendment rights against self-incrimination, such acts cannot be relied upon to supply validity to an otherwise defective indictment and permit prosecution under a charge which would otherwise be barred by limitations. Any claimed waiver of such Fifth Amendment rights, supported only by notice of an investigation of substantive charges, and without notice of any conspiracy investigation, violates the principles enunciated by this Court in Miranda, and others.

The validity of the indictment in the trial Count III charge of conspiracy in the instant proceedings depended absolutely upon the occurrence of alleged overt acts (i) and (j) as a part of the alleged conspiracy. Without them, the charge would have been barred by limitations, as the next preceding alleged overt act occurred on April 18, 1966, and the applicable five-year statute of limitations under 18 U.S.C. § 3282 would have expired at April 18, 1971. The indictment was not returned until October 15, 1971.

Alleged overt act (i) charged that petitioner had a conversation with two special agents of the Internal Revenue Service on November 29, 1966; while alleged overt act (j) charged a conference with two special agents and a group supervisor on October 29, 1968. Both were prem-

ised on the theory that petitioner had failed to disclose all possible relevant information at the asserted meetings.

It is uncontroverted from the record that the "meetings" constituting overt acts (i) and (j) related to an investigation of petitioner's tax returns for years then in question. A taxpayer being investigated for purposes of criminal tax prosecution is entitled to knowledge of that fact and of his constitutional rights and privileges just as any other suspect being investigated in contemplation of his possible criminal prosecution. *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill. E.D. 1967). Any information or advice given petitioner at those meetings upon which the Government might claim a waiver of Fifth Amendment rights would have necessarily have had to relate to possible substantive charges in connection with the returns for the years being examined. It is not claimed that petitioner was advised that he was the object of an investigation in relation to any conspiracy charge, nor that he was given any proper *Miranda* warning with respect thereto. *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Accordingly, any waiver of Fifth Amendment rights would have constituted an uninformed, and hence impermissible waiver.

If petitioner had not in fact effectively waived his Fifth Amendment rights against self-incrimination, the very acts which the government alleges as overt acts in furtherance of a conspiracy, were in fact valid exercises of his Fifth Amendment rights against self-incrimination. Petitioner respectfully contends that to allow the government to rely upon acts which are themselves valid exercises of Fifth Amendment privileges as acts in furtherance of a non-disclosed conspiracy charge, is itself a denial and violation of Fifth Amendment rights, and thus results in a deprivation of due process of law.

2. That reliance by the Government upon overt acts (i) and (j) as referred to in the indictment to extend the Statute of Limitations as to Count III was constitutionally impermissible and violative of petitioner's right to due process of law as guaranteed.

As aforestated in paragraph 1 of this petition, the two overt acts relied upon by the Government, a conversation with Internal Revenue agents on the 29th day of November, 1966, (i) and a conference interview with the Office of the Internal Revenue Service Intelligence Division in Kansas City, Missouri on the 29th day of October, 1968, (j) both took place after the focus of a criminal tax investigation had centered upon the Petitioner. Both also occurred after the alleged conspiracy had terminated as of April 18, 1966, when the Petitioner signed his 1964 Federal Tax return. The Petitioner had then withdrawn and the Statute of Limitations had tolled. As reflected in the indictment, the allegedly illegal activity on the part of the Petitioner was in not making records and information available, although his constitutional privilege would protect him from having to so incriminate himself. Accordingly, because of the constitutional protection against self-incrimination, the Government would be barred from returning an indictment against the Petitioner on these facts after April 18, 1971, unless the Government would be permitted the use of the tainted interviews as overt acts extending the Statute of Limitations. The indictment was in fact returned on October 15, 1971.

It is the apparent contention of the Government that during the two interviews, the Petitioner failed to disclose all adequate records in his possession. However, the exercise of the privilege against self-incrimination cannot be interpreted as an effort on the part of the Petitioner to wilfully engage in an overt act which could be construed

as a continuing violation of the statute. The Petitioner's unwillingness to incriminate himself would have to be interpreted as a segment of the conspiracy. Consistent with the authority of *Krulewitch* v. *United States*, 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949), wherein the Court rejected the implied agreement to conceal theory, the Petitioner submits that the two interviews could not have extended the running of the Statute of Limitations.

In answering the question as to whether the two interviews were in fact constitutionally protected, reference is made to the authority of *United States* v. *Wainwright*, 284 F. Supp. 129 (D.C. Colo. 1968), wherein it was held that the taxpayer became an accused so as to entitle him to warnings of his constitutional rights at the time his case was referred by the Internal Revenue Service Auditor to the Intelligence Division of the Internal Revenue Service. Upon the transfer from civil to criminal, the Petitioner was entitled to all the privileges and protections which the Fifth Amendment affords. Such being the case, the Petitioner herein was under no duty nor under any compulsion to give the Special Agents of the Intelligence Division any information which would tend to incriminate him. The exercise of Fifth Amendment rights cannot be used either to convict or to extend the pertinent Statute of Limitations.

As held in *United States* v. *Donovan*, 309 F. Supp. 152 (E.D. Va. 1969), persons defending a criminal prosecution for failure to comply with the wagering tax requirements "with a proper assertion of the privilege against self-incrimination cannot be criminally punished." Further, as stated in *United States* v. *Turzynski*, supra, a taxpayer being investigated for possible criminal tax prosecution is entitled to full knowledge of that fact and to all constitutional rights and privileges just as any other suspect being

interrogated in contemplation of possible criminal prosecution. Never having been adequately informed of the nature of the criminal action or of his constitutional protection as required by *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and more particularly because of his inherent Fifth Amendment privileges, the Petitioner had no affirmative duty to provide the incriminating links and absent the affirmative duty, this assertion cannot be claimed by the Government as the overt acts necessary to maintain jurisdiction.

In *Marchetti* v. *United States,* 390 U.S. 39, 10 L. Ed. 2d 889, 88 S. Ct. 697 (1968) the Court held that the defendant's assertion of his Fifth Amendment constitutional protection against self-incrimination constituted a complete defense to prosecution. The Court further held that the defendant's failure to assert his privilege against self-incrimination to United States Treasury Agents at the moment the Federal Occupational Tax payments were due did not constitute irretrievable abandonment of his constitutional privileges. The controlling standard is whether the claimant is confronted by substantial and real and not merely trifling or imaginary hazards of incrimination. It is the Petitioner's contention, here, that his situation is analogous to that of *Marchetti,* supra. If he had produced the information sought by Internal Revenue Agents, it would, apparently, have been self-incriminatory and used as evidence against him. By remaining silent, as provided by the Constitution, the Petitioner could not have provided the overt acts alleged in the indictment. Such protected silence, then, occurred well after the completion of the alleged conspiracy. Neither, then, could such silence have the effect of reviving the conspiracy as the Government

contends. As aforesaid, *Krulewitch,* supra, rejected the theory of implied agreement to conceal.

If, arguendo, it could be said that Petitioner's failure to provide the sought after matter was a concealment of the conspiracy and thus indictable, this Court has clearly defined the provisions of conspiracy as they so relate in *Grunewald* v. *United States,* 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957), where, in reaffirming *Krulewitch,* supra, and *Lutwak,* 344 U.S. 604, 97 L. Ed. 593, 73 S. Ct. 481 (1953) the Court held as follows:

> "The crucial teaching of *Krulewitch* and *Lutwak* is that after the central purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. Acts of covering up, even though done in a context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirator's traces. Sanctioning the Government's theory would for all practical purposes wipe out the Statute of Limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." 353 U.S. 401-402.

As in *Grunewald*, the Government cannot rely on the alleged acts of concealment to extend the life of the conspiracy so as to prevent the tolling of the Statute of Limitations.

3. In view of divergent application by the various Circuits, clarification is needed by the Court regarding the test for admissibility of evidence under the federal shop-book rule, 26 U.S.C. § 1732(a). The absence of inherent trustworthiness of records as an essential element of such admissibility has resulted in a denial of due process to this petitioner.

At common law, exceptions to the hearsay rule permitting the introduction of business records in evidence were each founded upon the same considerations: the usual reliability and trustworthiness of business records as compared with other memoranda, and the practical necessity of a resort to records when the person who made the entry and upon whose knowledge it was based was unavailable as a witness because of death, disappearance, insanity or other reason. *McCormick, Evidence,* § 281 (1954); 5 *Wigmore, Evidence,* §§ 1521, 1522 (3d. ed. 1940). Judges looked to a number of factors to determine whether records offered as evidence met the prescribed standard of trustworthiness set down by these early cases. See 5 *Wigmore, Evidence,* §§ 1522-27 (3d. ed. 1940). As the number and complexity of the various types of records necessary for the conduct of modern business grew, the requirement of probable trustworthiness presented an even more perplexing problem for the courts, and ultimately led to the statutory enactment of 28 U.S.C. § 1732 and a multitude of like state statutes.

The language of 28 U.S.C. § 1732(a) in providing that "all other circumstances of making such writing or record,

including lack of personal knowledge by the entrant or maker . . . shall not affect its admissibility" would seem to sanction admission of any regularly kept record prepared at or near the time of the event, regardless of its content or the informational source. See *McCormick, Evidence,* § 286 (1954). However, this Court and the courts of a majority of the circuits have been reluctant to extend the statutory exception to entries which lack the traditional earmarks of reliability. See, for example, *Hartzog* v. *United States,* 217 F. 2d 706 (C.A. 4th 1954); *New York Life Ins. Co.* v. *Taylor,* 147 F. 2d 297 (C.A. D.C. 1945).

Such decisions involve a determination that Congress intended the phrase "regular course of any business" to refer to the quality of the record as well as the regularity of its preparation. The legislative history of the Act furnishes no support for the position that a fundamental change from the common law requirement of probable trustworthiness was contemplated. See S. Rep. No. 1965, 74th Cong., 2d Sess. (1936); 80 Cong. Rec. 5733 (1936) (remarks of Congressman Sumners).

This Court had occasion to consider whether Congress intended to render all regularly prepared records admissible regardless of their character and source in the landmark decision in *Palmer* v. *Hoffman,* 318 U.S. 109 (S. Ct. 1943), and rejected this interpretation out of hand as unwarranted in view of the history of the Act. Mr. Justice Douglas, speaking for a unanimous Court, declared mere regularity of preparation to be an improper test of admissibility, and stated that the courts must look to the "character of the records and their earmarks of reliability . . . acquired from their source and origin and the nature of their compilation." *Id.,* at 114. Otherwise, "the probability of trustworthiness of records . . . would be forgotten as the basis of the rule." *Id.,* at 113-14.

Despite the fundamental necessity of probable trustworthiness as garnered from their origin and source as an essential test for admissibility of business records as laid down by *Palmer*, supra, a number of circuits, notably the Second, the Seventh, the Ninth, and the Tenth by reason of the decision complained of herein, have adopted divergent, conflicting and far less stringent safeguards. Thus, for example, the Second Circuit appears to have taken the position that the court should place primary emphasis on the mere "regularity" of the business practice in making records of the type offered, and in the absence of a motive to misrepresent, regularity in itself will be a sufficient guarantee of trustworthiness. See *Terrasi* v. *South Atlantic Lines, Inc.*, 226 F. 2d 823 (C.A. 2d 1955), *cert. denied* 350 U.S. 988 (1956); *Korte* v. *New York N.H. and H.R.R.*, 191 F. 2d 86 (C.A. 2d 1951). This cavalier approach of treating mere regularity of the business practice as the essential test for admissibility seems likewise to have been adopted by the Seventh Circuit, as evidenced by its decision in *U. S.* v. *Stonehouse*, 452 F. 2d 455 (C.A. 7th 1971). A second, but related approach, appears to have been adopted by the Ninth Circuit in its decision in *Standard Oil Co.* v. *Moore*, 251 F. 2d 188 (C.A. 9th 1957), *cert. denied* 356 U.S. 975 (1958), although the court therein does take strong note of the instruction from *Palmer*, supra, suggesting that a record cannot be considered sufficiently reliable unless it relates to the systematic conduct of the business as a business. Nevertheless, it expresses primary concern with whether the records contain information pertaining to the entrant's normal business operations rather than with the source of information upon which the record is based or the systematic procedure employed in its compilation.

Contrasted with the foregoing decisions of the Second, Seventh and Ninth Circuits, may be decisions of the Fifth,

Fourth, Eighth and District of Columbia Circuits, which clearly heed rather than avoid the fundamental instruction from *Palmer,* supra, regarding the necessity of trustworthiness which must be attached to any business record for its admissibility. Thus, for example, the Fifth Circuit, in its decision in *Sabatino* v. *Curtiss National Bank of Miami Springs,* 415 F. 2d 632 (C.A. 5th 1969) succinctly points out, at 637:

> "Thus the decisions excluding offered items indicate that the main reason for the statutory language 'in regular course of any business' is to provide a check on *trustworthiness* in that (1) *the records must be kept pursuant to some routine procedure designed to assure their accuracy,* (2) *they must be created for motives that would tend to assure accuracy . . ., and* (3) *they must not themselves be mere cumulations of hearsay or uninformed opinion.*" (Emphasis supplied)

See also *England* v. *United States,* 174 F. 2d 466 (C.A. 5th 1949). Support for this position is likewise found by the Fourth Circuit in its opinion, *United States* v. *Grow,* 394 F. 2d 182 (C.A. 4th 1968), which clearly enunciates at 205:

> "The test of admissibility under Title 28, § 1732, is not that the party making the entry must identify and explain the document, but rather that the record must carry with it some guaranty of trustworthiness. Admissibility is to be determined by the character of the records and their earmarks of reliability acquired from their source and origin and the nature of the compilation."

See also *Hartzog* v. *United States,* 217 F. 2d 706, 710 (C.A. 4th 1954), which is particularly similar to the case at bar in that the record of transactions there sought to be introduced represented the unjustified conclusions of the

entrant, and were the product of his judgment and discretion and not the product of any efficient clerical system then being carried forward in the regular course of business. The conclusion properly to be reached likewise finds support in the Eighth Circuit decision in *Skogin* v. *Dow Chemical Company,* 375 F. 2d 692 (C.A. 8th 1967), where the learned discussion by Judge Gibson (at 705) concerning the inherent untrustworthiness of records laden with unsupported conclusions on the part of the entrant, and the difficulty in defining the exact point at which conclusions become objectionable, should be noted with particularity. For cases from the District of Columbia Circuit supporting the teaching of *Palmer,* supra, as to the absolute requirement of trustworthiness which must be attributable to such records, see *Lyles* v. *United States,* 254 F. 2d 725 (C.A. D.C. 1957), *cert. denied* 356 U.S. 961 (1958); and *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (C.A. D.C. 1945).

Turning to the case at bar, petitioner's conviction under Count II of a three-count indictment, in which he faced the substantive charge of filing a false income tax return for the calendar year 1964, turned almost entirely upon evidence adduced from Government Exhibit 13-A, a cash disbursement journal of Policy Budget Plan, Inc., a corporation in which petitioner had an interest. The exhibit was identified by a Mr. Theodore Ewing, a co-owner of the company, and on the basis of his testimony, was admitted into evidence by the court as a business record properly admissible under the provisions of 28 U.S.C. § 1732(a). The journal in question contained a listing of checks issued by the company during the early months of 1964, and provided columnar extensions for the purpose of categorizing the purposes for which the checks were drawn. The government sought to prove that some $27,065.75 in checks drawn payable to petitioner and a Buick automo-

bile agency during the month of January 1964, and additional checks dated in February through April of that year represented unreported income by petitioner from the corporation, as against petitioner's contention that they represented loans. Although a column appeared in the journal for categorizing payments as salaries, none of the checks in question were so categorized. All were listed in a column identified as "sundry" and with the sole exception of the check to the automobile agency, bore no further explanation. As to the latter, it showed only that it was for the purchase of an automobile. In the course of his testimony, Mr. Ewing testified variously that:

(a) The entries in the journal were made largely by an employee who was described merely as an employee of the bookkeeping department (Tr. 162), with no testimony being offered as to her background or skill as an accountant, or with respect to any training or ability which she might have for making the types of conclusions regarding payouts to petitioner which the Government sought to imply from the journal;

(b) That said employee had incorrectly posted at least one $5,000 payment allegedly made to petitioner, which was in fact a check to Western Union in the amount of $250 (Tr. 165, 166);

(c) That Mr. Ewing himself borrowed money from the company (Tr. 131); that all such loans, including both those to petitioner and Ewing were noted in the sundry column (Tr. 182); that his own withdrawals as loans were not marked any differently than those of petitioner (Tr. 183); and that he considered the journal entries, summaries and checks testified to as loans to petitioner and due by him to the company (Tr. 183);

(d) That the car purchased with the check drawn payable to the automobile company could be considered a company car (Tr. 185); and

(e) That the cash disbursement journal was not kept currently in the normal course of business from and after January 1964 (Tr. 181); that beginning specifically in January 1964, checks were not posted in any kind of chronological order either as to date or number (Tr. 160); and that there was evidence that the records were inaccurate (Tr. 191).

Additionally, Ewing testified that the admitted journal was only one-half of a dual entry set of books (the other one-half being a general ledger rejected in evidence by the court), and that the entries reflected therein would not be representative of entries made in the regular course of their business without introduction of the second half of the entry (Tr. 116, 117).

In its opinion, the Tenth Circuit affirmed the trial court's ruling of admissibility of the cash disbursement journal under 28 U.S.C. § 1732. Under the most favorable interpretation possible, this could constitute no more than an affirmation of the limited and seemingly erroneous construction attributed to the statute by the Second and Seventh Circuits in their decisions in *Terrasi, Korte,* and *Stonehouse,* supra, that mere regularity of the business practice in making records of the type offered provides sufficient guaranty of trustworthiness. The petitioner would contend that not even regularity has been shown in this case. In any event, the clear and stringent requirements respecting trustworthiness set out by this Court in *Palmer,* supra, have without question, not been met.

These conflicts, together with the prejudice occasioned petitioner by the wrongful admission of the subject journal, justify the grant of certiorari to review the judgment below.

4. The joinder of an entirely separate conspiracy charge (Trial Count III), arising out of a wholly separate series of acts, transactions, scheme, plan or design, with two distinct substantive charges (Trial Counts I and II) is constitutionally impermissible where such joinder results in extreme prejudice to the defendant in the eyes of the jury, confounds his defense and permits the accumulation of unrelated evidence to be weighed against him; the present petitioner was denied a fair and impartial trial on the substantive charges against him because such impermissible joinder promoted a finding of substantive guilt solely by inference from massive and cumulative conspiracy evidence; and the joinder permitted herein is in direct conflict with the decision of this Court in McElroy v. United States, 164 U.S. 76, 17 S. Ct. 31 (1896).

The Trial Court joined two separate indictments over the objection of petitioner's counsel. Counts I and II of the first indictment charged violation of 26 U.S.C. § 7206(1) relating to income tax returns filed by petitioner for 1963 and 1964. Count III of a separate indictment charged violation of 18 U.S.C. § 371 relating to an alleged conspiracy from 1962 to 1971. Each indictment required its own distinct evidence and witnesses. No connection was ever established between Counts I and II and Count III. The great bulk of time and energy at trial was devoted to the conspiracy charge. Great masses of brokerage records and other evidence, as well as volumes of testimony were attendant thereto. By contrast, the trial time attendant the substantive Count II charge of which petitioner was likewise convicted was infinitesimally small. The evidence in support of this charge consisted almost entirely of a single Government exhibit, Exhibit 13-A, and testimony through which it was admitted.

This Court has previously condemned such joinder:

"We do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts." *McElroy* v. *United States*, 164 U.S. 76, 17 S. Ct. 31 (1896) at 79-80.

Here petitioner was compelled to defend two lawsuits.

"Appellant should not, according to the ancient formula, be confounded in making his defense. *Castellini* v. *United States*, 64 F. 2d 636 (C.A. 6th 1933). The petitioner was definitely confounded in making his defense.

The mass of evidence used to support the conspiracy charge is far more difficult to explain and contain than a fraudulent tax return charge. As a result the joinder precluded petitioner from testifying with regard to the tax return charge.

"Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. *Cross* v. *United States*, 335 F. 2d 987 (C.A. D.C. 1964) at 989.

The prejudice is not limited to defending the case but also the effect this may have on the jury.

In *Drew* v. *United States*, 331 F. 2d 85 (C.A. D.C. 1964), the court stated:

"Prejudice to defendant by joinder of offenses may arise in that (1) defendant may become embarrassed or confounded in presenting separate defenses; (2) the jury may use evidence of one crime to infer a criminal disposition of defendant from which is found his guilt of the other crime; or (3) the jury may cumulate evidence of various crimes charged and find guilt when, if considered separately, it would not so find; prejudice may also reside in

latent feelings of hostility engendered by the charging of several crimes as distinct from only one." (Syl. 4)

The far flung and sprawling evidence presented concerning the conspiracy charge can and did have a confusing effect on the jury and resulted in the jury regarding one offense as corroborative of the other, when this was not the case. See 74 Yale L.J. 553 (1965).

The effect on the jury is evident when it is noted that the statute charged in Count II requires specific intent and the Government was required to demonstrate that the petitioner knowingly and wilfully committed the acts alleged. Only the unconstitutional Exhibit 13-A (as previously discussed) was presented to support the allegations of Count II. Eliminating that exhibit from consideration, the only other possible explanation for the jury decision is the bulk of time and energy spent on the conspiracy charge which spilled over into Count II. The jury cumulated the evidence of Count III to find guilt, when if Count II was considered separately, it could not so find. See *Drew* v. *United States,* supra.

Neither the case law nor the Federal Rules of Criminal Procedure (see 18 U.S.C., Rule 8) condones such a joinder. The obvious and substantial prejudice occasioned by the joinder prohibited and denied petitioner a fair and impartial trial and warrants a reversal of the conviction in Count II.

CONCLUSION

Petitioner respectfully submits that for the additional reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

DONALD N. PACHECO
PACHECO, AUER & MANZANARES, P.C.
Suite 1040, Capitol Life Center
Denver, Colorado 80203
Telephone: (303) 892-5700

THOMAS W. TIERNEY
2700 Commerce Tower
Kansas City, Missouri
Telephone: (816) 474-9767

Attorneys for Petitioner

CERTIFICATE

The undersigned, Counsel for Petitioner herein, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay. Counsel further certifies that the Petition is restricted to substantial grounds available to Petitioner but not previously presented.

DONALD N. PACHECO
PACHECO, AUER & MANZANARES, P.C.
Suite 1040, Capitol Life Center
Denver, Colorado 80203
Telephone: (303) 892-5700

THOMAS W. TIERNEY
2700 Commerce Tower
Kansas City, Missouri
Telephone: (816) 474-9767

By .....
Attorneys for Petitioner